Sykt East Coast & Ors v Makna Mujur Sdn Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-329–02 OF 2017
BADARIAH SAHAMID, ZABARIAH MOHD AND HARMINDAR SINGH JJCA
19 SEPTEMBER 2019

Civil Procedure — Locus standi — Locus standi to bring action — Appellants sued respondents for nuisance, trespass and breach of statutory duty in relation to common property — High Court dismissed appellants' action — Whether appellants as purchaser were entitled to enforce rights relating to common property

Land Law — Strata title — Common property — Appellants sued respondents for nuisance, trespass and breach of statutory duty in relation to common property — High Court dismissed appellants' action — Whether appellants as purchaser were entitled to enforce rights relating to common property — Building and Common Property (Maintenance and Management) Act 2007 ss 8 & 10(1)(a), (1)(b), (1)(c)

This was an appeal by the appellants as the purchasers of shop houses in KL Plaza against the decision of the High Court in dismissing their claim against the respondents for nuisance, trespass and breach of statutory duty in respect of the redevelopment and renovation of KL Plaza which involved the common property in KL Plaza. The main issue was whether the appellants were entitled as purchasers to enforce rights relating to the common property. The appellants argued that the common property was vested in all the owners of the units, as such, the approval for any redevelopment or renovation ought to have been obtained at a general meeting of all the owners of the units and not approval by the second respondent as the joint management body ('JMB') only. In relation to this argument, it ought to be noted that the executive director of the fifth appellant ('PW11') who was the representative of the shop house owners was elected as a member of the joint management committee ('JMC') in the JMB.

Held, dismissing the appeal with costs and affirming the order of the High Court:

(1) It was plain that the powers and duties of the JMC had not been restricted in any way in the general meeting. This was shown in the minutes of meetings of both annual general meetings held by the JMB on 29 May 2008 and on 17 December 2010. There were also none of the requisitioning situations under s 10(1)(a), (1)(b) or (1)(c) of the Building and Common Property (Maintenance and Management) Act 2007 ('the

BCPA 2007'). Therefore, the approval given by the JMC, on behalf of the JMB, without calling for the general meeting, was perfectly valid and within the powers and duties under the BCPA 2007. There was no breach of the BCPA 2007 and it must followed that there was no breach of any statutory duty as claimed (see paras 48–49).

(2) The perspectives of the proposed renovation/redevelopment were presented to the JMC members during the first JMC meeting. None of the members had raised any objection. The second JMC meeting was held on 26 November 2008 where the JMC unanimously confirmed the minutes of the first JMC meeting. None of the JMC members had raised any objection. The court agreed with the learned judge that there was ample contemporaneous documentary evidence to show that the parcel owners/purchasers, through members of the JMC who represented them, including PW11 who represented the appellants/shop houses, were apprised of the purpose and plans of the renovation/redevelopment of KL Plaza and had unanimously supported and endorsed the renovation/redevelopment (see paras 51 & 56).

(3) The appellants had effectively no standing to sue the respondents. By virtue of statutory law in the form of s 8 of the BCPA 2007, the second respondent had sole control and management of the common property of KL Plaza. By law, the JMB was the guardian of the common property. Any claims against third parties in relation to the common property can only be brought by the JMB and not the individual parcel owners or some of them together. It was for the JMB alone to pursue such claims for the benefit of all parcel owners. It was for this reason that the JMB had been given the right in law to sue or be sued in its name (see paras 57 & 60).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu sebagai pembeli rumah kedai di KL Plaza terhadap keputusan Mahkamah Tinggi dalam menolak tuntutan mereka terhadap responden atas gangguan, pencerobohan dan pelanggaran tanggungjawab statutori berkenaan dengan pembangunan semula dan pengubahsuaian KL Plaza yang melibatkan harta bersama di KL Plaza. Isu utama adalah sama ada perayu berhak sebagai pembeli untuk menguatkuasakan hak yang berkaitan dengan harta bersama. Perayu berhujah bahawa semua pemilik unit adalah berhak ke atas harta bersama, oleh itu, kelulusan bagi apa-apa pembangunan semula atau pengubahsuaian sepatutnya diperolehi pada mesyuarat agong semua pemilik unit dan bukan diluluskan oleh responden kedua sahaja sebagai badan pengurusan bersama ('BPB'). Berhubung dengan hujah ini, perlu diingatkan bahawa pengarah eksekutif perayu kelima ('PW11') yang mewakili pemilik rumah kedai telah dipilih sebagai salah seorang ahli jawatankuasa pengurusan bersama ('APB') di BPB.

Diputuskan, menolak rayuan dengan kos dan mengesahkan perintah Mahkamah Tinggi:

(1) Adalah jelas bahawa kuasa dan kewajipan APB tidak pernah dihadkan dalam apa jua cara dalam mesyuarat agung. Ini ditunjukkan dalam minit mesyuarat kedua-dua mesyuarat agung tahunan yang diadakan oleh BPB pada 29 Mei 2008 dan pada 17 Disember 2010. Tidak terdapat juga keadaan penyerahan di bawah s 10(1)(a), (b) atau (c) Akta Bangunan dan Harta Bersama (Penyenggaraan dan Pengurusan) 2007 ('ABHB 2007'). Oleh itu, kelulusan yang diberikan oleh APB, bagi pihak BPB, tanpa memanggil mesyuarat agung, adalah sah dan dalam kuasa dan tanggungjawab di bawah ABHB 2007. Tidak ada pelanggaran terhadap ABHB 2007 dan oleh itu, tidak terdapat pelanggaran mana-mana kewajipan statutori seperti yang didakwa (lihat perenggan 48–49).

(2) Perspektif pengubahsuaian/pembangunan semula yang dicadangkan telah disampaikan kepada ahli APB semasa mesyuarat APB yang pertama. Tiada seorang pun ahli telah menimbulkan apa-apa bantahan. Mesyuarat APB yang kedua telah diadakan pada 26 November 2008 di mana APB sebulat suara mengesahkan minit mesyuarat APB yang pertama. Tidak ada ahli APB yang menimbulkan sebarang bantahan. Mahkamah bersetuju dengan hakim yang bijaksana bahawa terdapat bukti dokumentari yang mencukupi untuk menunjukkan bahawa pemilik/pembeli tapak, melalui anggota APB yang mewakili mereka, termasuk PW11 yang mewakili perayu-perayu/rumah kedai, sudah dimaklumkan mengenai tujuan dan rancangan pengubahsuaian/pembangunan semula KL Plaza dan sebulat suara menyokong dan mengesahkan pengubahsuaian/pembangunan semula tersebut (lihat perenggan 51 & 56).

(3) Perayu tidak mempunyai kedudukan untuk menyaman responden. Berdasarkan undang-undang berkanun dalam bentuk s 8 ABHB 2007, hanya responden kedua mempunyai hak pengawalan dan pengurusan ke atas harta bersama KL Plaza. Mengikut undang-undang, BPB adalah penjaga harta bersama. Apa-apa tuntutan terhadap pihak ketiga berkaitan dengan harta bersama hanya boleh dibawa oleh BPB dan bukan pemilik-pemilik tapak individu atau sebahagiannya bersama-sama. Hanya BPB sahaja berhak untuk membawa tuntutan tersebut untuk manfaat semua pemilik tapak. Atas sebab ini BPB telah diberikan hak dalam undang-undang untuk menyaman atau disaman atas namanya (lihat perenggan 57 & 60).]

Cases referred to

Abraham Aaron Isaac v Management Corporation Strata Title Plan No 664 [1999] 3 SLR 81, CA (refd)

A *Poh Kiong Kok v Management Corporation Strata Title Plan No 581* [1990] 3 MLJ 206, HC (refd)

Legislation referred to

B Building and Common Property (Maintenance and Management) Act 2007 (repealed by the Strata Management Act 2013) ss 4, 4(3), 5, 6, 6(1), 8, 10(1)(a), (1)(b), (1)(c), 11, 11(1)
Federal Capital Act 1960 s 5
Strata Management Act 2013

C **Appeal from**: Civil Suit No 22NCVC-686 of 2011 (High Court, Kuala Lumpur)

Gopal Sri Ram (Major Murthi, How Li Nee and Yasmeen Soh with him) (Law Chambers of Murthi & Partners) for the appellants.
D *Oommen Kurien (Celine Chelladurai with him) (Celine & Oommen) for the first respondent.*
Yau Her Lerk (Yau Partnership) for the second respondent.
Nooron Aini bt Zakaria (Zirwatul Hanan bt Abdul Rahman with her) (Azaine & Fakhrul) for the third respondent.
E

Harmindar Singh JCA (delivering judgment of the court):

[1] This appeal raises important questions about the rights and powers of the
F joint management body vis a vis the owners of parcels in a strata governed building. The subject of the appellants' appeal concerns the shopping centre known as KL Plaza ('Fahrenheit 88') located at Bukit Bintang, Kuala Lumpur.

[2] The appellants are purchasers of shop house units in the KL Plaza
G building. KL Plaza was developed by Lian Seng Properties Sdn Bhd sometime in 1981. The development consisted of shop houses, commercial shop lots and condominiums. It was completed sometime in 1984. It was subsequently redeveloped and renovated by another developer in 2010.

H **[3]** The appellants were not happy with how the renovation and redevelopment was carried out. They alleged trespass and nuisance on the common property by the developer. They commenced the instant suit in 2011 to compel the said developer to restore some of the corridors in the building to its original state. The appellants also claimed for breach of statutory duty
I against the second and third defendants. After a full trial, the Kuala Lumpur High Court, on 20 January 2017, dismissed the appellants' claim with costs and allowed the first respondent's counterclaim in part.

[4] Aggrieved with this decision, the appellants filed this appeal. After

having read the written submissions as well as hearing oral arguments on the issues raised, we indicated to the parties that we would deliver our decision on a date to be informed. Having given the appeal our utmost consideration, this is now our decision which shall constitute the judgment of the court.

BACKGROUND FACTS

[5] The background facts are set out in the grounds of judgment of the learned Judge and also in the submission of the parties. In view of the matters raised in the appeal, the background facts, so far as they are relevant to the issues raised in instant appeal, can be restated as follows. Lian Seng Properties Sdn Bhd ('Lian Seng Properties') was the original developer and registered proprietor of forty (pieces of lands situated at Lot 67, Bandar Kuala Lumpur ('original lands'), upon which KL Plaza was erected.

[6] It was a mixed development consisting of the following:

(a) five storey shopping podium and minimum lettable area of approximately 232,702 sqft ('shopping podium');

(b) minimum lettable area of about 38,444 sqft annexed to the shopping podium ('restaurant block');

(c) ten storey office tower block above the shopping podium ('office tower block');

(d) three storey carpark of approximately 573 carpark bays, 29 surface carpark bays and 60 motorcycle bays ('carpark lot');

(e) twin apartment blocks known as 'KL Court' and 'KL Heights' respectively consisting of 266 units of apartments ('apartment blocks'); and

(f) one clubhouse at Level 9 of KL Plaza ('clubhouse').

[7] In this regard, Kuala Lumpur City Hall had issued a certificate for partial occupation dated 9 April 1986 (Certificate No 13216) for the shopping podium and shop houses; but the office tower block, the restaurant block and the apartment blocks were only issued with a temporary certificate of occupation.

[8] The first to sixth appellants are original purchasers and the seventh to 13th appellants are sub-sale purchasers of the five storey shop houses annexed to the shopping podium of KL Plaza. Essentially, the appellants are owners of the 18 out of the 23 shop houses annexed to the shopping podium of KL Plaza. No other owners or categories of owners had brought any such action against the first, second and third respondents.

[9] The first respondent is a private limited company incorporated under the laws of Malaysia and is part of the Pavilion Group of Companies. The first respondent is the current registered proprietor of the land held under Geran 58574, Lot 1322 Seksyen 67, in the Town and District of Kuala Lumpur on which KL Plaza is erected. The second respondent is a body corporate established pursuant to the Building and Common Property (Maintenance and Management) Act 2007 ('the BCPA 2007'). The second respondent was established on 29 May 2008 when it convened its first meeting of the joint management body. The third respondent is the corporation sole/body corporate established pursuant to s 5 of the Federal Capital Act 1960 and is lawfully vested with the authority to approve the building plans of all buildings in the City of Kuala Lumpur.

[10] By way of a sale and purchase agreement dated 5 June 1989 and a supplemental agreement dated 19 March 1990 ('Lian Seng Properties SPA'), Lian Seng Properties sold to Noble Circle (M) Sdn Bhd ('Nobel Circle') the original lands and a substantial part of KL Plaza (shopping podium, restaurant block, office tower block and the carpark lot). The original lands were transferred to Noble Circle and amalgamated into one title held under Geran 58574, Lot 1322 Seksyen 67, in the Town and District of Kuala Lumpur.

[11] Pursuant to cll 12.1, 6.4 and the Fourth Schedule of the Lian Seng Properties SPA, Noble Circle was also to undertake the following duties and obligations pertaining to KL Plaza:

(a) to manage the commercial blocks ie the shopping podium, the shop houses, the restaurant block, the office tower block and the carpark lot;

(b) to be bound by Lian Seng Properties' covenants with the other owners of the individual units of KL Plaza ('third-party purchasers') under the respective sale and purchase agreements;

(c) to procure the issuance of the strata titles for the third-party purchasers over their units in KL Plaza; and

(d) to execute and deliver a valid and registrable memorandum and transfer in favour of the third-party purchasers' units in KL Plaza.

[12] By way of a sale and purchase agreement dated 15 August 2007 ('Noble Circle SPA') Noble Circle sold to the first respondent the Commercial Units (as defined in Recital G and Schedule 1 of the Noble Circle SPA) together with the plant and equipment (as defined in cl 1.1 and Schedule 5 of the Noble Circle SPA) and the land held under Geran 58574, Lot 1322 Seksyen 67, in the Town and District of Kuala Lumpur and these were transferred to the first respondent and registered in its name. Completion of the Noble Circle SPA occurred on 13 February 2008 and the purchase price paid by the first respondent was

RM425,500,000. Under the Noble Circle SPA, the first respondent's obligations to the third-party purchasers was limited to the following:

(a) to sub-divide KL Plaza and to apply and procure the issuance of the strata titles for the third-party purchasers' units within KL Plaza; and

(b) on issuance of the strata titles, and subject to the third-party purchasers having paid all amounts and due to the management of KL Plaza (the second respondent), to deliver the strata titles to the third-party purchasers and execute the relevant memorandum of transfer in favour of the third-party purchasers for their respective units.

[13] There were no major renovations/redevelopment undertaken on KL Plaza by either Lian Seng Properties or Noble Circle and prior to the first respondent's intended plans for KL Plaza, the last development order issued by Kuala Lumpur City Hall was on 29 November 1979.

[14] Upon completion of the Noble Circle SPA, and as the KL Plaza building itself was more than 26 years old, the first respondent intended to extensively renovate, refurbish and rebrand KL Plaza. To this end, the first respondent approached NWKA Architects Sdn Bhd ('NWKA') to provide architectural consultancy services in respect of the redevelopment of KL Plaza.

[15] Although the first respondent had an option to manage KL Plaza, it was envisaged that this obligation/duty to maintain and manage KL Plaza would be undertaken by the second respondent. In this regard, and pursuant to s 5 of the BCPA 2007, the first respondent issued a notice of the first meeting dated 9 May 2008 to all purchasers of KL Plaza informing them of the first respondent's intention to convene the first meeting of the second respondent.

[16] In accordance with s 6 of the BCPA 2007, the First Meeting of the second respondent was held on 29 May 2008 and, inter alia, the following material matters were discussed/considered:

(a) it was unanimously agreed that the second respondent would be called 'KL Plaza Joint Management Body';

(b) in respect of the election of the committee members of the joint management committee ('JMC') of the second respondent, one of the purchasers suggested that fair representation of KL Plaza, which consists of various components (shop houses, shopping podium, apartment block and etc), be reflected within the JMC and this suggestion was unanimously accepted. The following individuals were elected as committee members of the JMC of the second respondent:

(c) En Mohamed Fairuz bin Abdul Malek;

A (d) Ms Khaw Wei See;

(e) Mr Leong Yuen @ Leong Nam Yew (Executive Director of the fifth appellant, elected as the representative of the shop houses);

(f) Mr Foong Meng Khum;

B (g) Mr Loh Kong Fatt;

(h) Dato' Lee Tuck Fook; and

(i) Mr Liew Yuet Siong.

C An issue was raised regarding the proposed redevelopment of KL Plaza. It was stated that the proposals were still being finalised and the first respondent will consult the second respondent once the same is finalised.

D **[17]** The first JMC meeting of the second respondent was held on 1 August 2008 with all the elected committee members of the JMC in attendance and wherein, inter alia, the following material matters were discussed/considered:

(a) Ms Khaw Wei See queried regarding the status of the strata titles and Mr E Liew Yuet Siong explained that once the refurbishments were completed the first respondent will have to obtain a certificate of fitness before being able to apply for the strata titles. It was also explained that the first respondent is investing a lot of money to refurbish KL Plaza which included replacing various old mechanical and electrical devises;

F (b) Mr Leong Yuen @ Leong Nam Yuen wanted more time to study the House Rules. Dato' Lee Tuck Fook proposed that the committee members provide their comments to the same within one week and thereafter a circular resolution will be sent to the committee members for adoption;

G (c) proposed reduction of service charges for Retail Mall & Office Tower. As the redevelopment of KL Plaza primarily affects the shopping podium and the office tower block, it was proposed that a 40% reduction in service charges would be given to the purchasers of such units. Mr Leong Yuen @ Leong Nam Yuen queried whether the purchasers of the shop houses would also be given a reduction but was told that no reduction in service charge would be given for shop houses. The shop houses are meant to have the entrance as their main door and that the access to the retail mall through the back of the shop houses is via the allowance of the first respondent; and

I (d) the perspectives of changes to KL Plaza/refurbishment plans of KL Plaza were also presented to the committee members.

[18] The architect, NWKA, on behalf of the first respondent, had submitted the application for planning permission to Kuala Lumpur City Hall (third respondent) on 19 August 2008. The first respondent sought planning permission for additional floor space within KL Plaza and to change the facade of the office tower block. It was not disputed that the aforesaid planning permission did not concern nor involve the shop houses.

[19] The second JMC meeting of the second respondent was held on 26 November 2008 with all the elected committee members of the JMC except Ms Khaw Wei See in attendance, and wherein, inter alia, the following material matters were discussed/considered:

(a) the committee members extensively discussed an issue raised in respect of the House Rules, as presented by Mr Leong Yuen @ Leong Nam Yuen, in his capacity as the committee member representing the shop houses;

(b) Mr Leong Yuen @ Leong Nam Yuen raised the issue that at the last JMC meeting held 1 August 2008, the committee members were shown the 'changes to the mall' 'and not the refurbishment plans. It was noted that what was shown were 'perspectives of changes to the mall' instead of the refurbishment plans. The committee members were then shown the redevelopment plans on the proposed internal and external changes to KL Plaza. All the committee members agreed that the development plans were good and for everyone's benefit. Mr Leong Yuen @ Leong Nam Yuen had specifically stated that the owners of shop houses did not have any objections to the proposed redevelopment. It was also noted at this meeting that a three feet back corridor access as required by the building by-laws will be provide to all existing shop houses. All the committee members unanimously agreed and supported the redevelopment plans and left the question of timing of the redevelopment to the first respondent;

(c) Mr Leong Yuen @ Leong Nam Yuen, as representative of the shop houses, raised an issue in respect of the staircase of the shop houses. Mr Leong Yuen @ Leong Nam Yuen stated that although the staircase is common property, it should only be used by the owners of the shop houses, their tenants and customers. The committee members were of the view that the second respondent cannot alter the legal definition of the staircase but Mr Foong Meng Khum will discuss the matter with Mr Leong Yuen @ Leong Nam Yuen on whether they could restrict the usage and present a proposal at the next meeting; and

(d) Mr Leong Yuen @ Leong Nam Yuen queried whether there could be a reduction of the service charges for the shop houses during the period of redevelopment of KL Plaza. The committee members took note of Mr

Leong Yuen @ Leong Nam Yuen's request and agreed to review and to present the same at the next meeting.

[20] In a letter dated 27 November 2008, the second respondent informed the third respondent that it had no objections to the proposed renovations/redevelopment of KL Plaza. In a letter dated 18 December 2008 from the fifth appellant to the second respondent, Mr Leong Yuen @ Leong Nam Yuen resigned as a committee member of the JMC of the second respondent due to ill health.

[21] In a letter dated 14 April 2009, NWKA informed the first respondent that the following must be fully complied with to fulfil the requirements of a protected fire escape corridor:

> (a) all walls fronting the corridor must be of a minimum two hours fire rated material ie 110 mm thick brick wall with 20 mm thick cement plaster on both sides; (b) all doors must be of a minimum one hour fire rated; and (c) all doors must swing inwards and not towards the corridor.

[22] On 4 May 2009, the first respondent's application for planning permission in respect of the redevelopment of KL Plaza was rejected by Kuala Lumpur City Hall (the third respondent) on the basis that there were not enough carparks for the development. On 15 May 2009, NWKA on behalf of the first respondent, submitted a revised application for planning permission to Kuala Lumpur City Hall. In a letter dated 17 September 2009, NWKA was informed by Kuala Lumpur City Hall that the first respondent's aforesaid revised application was approved on 8 September 2009.

[23] By way of a notice dated 20 October 2009, the second respondent informed all owners/purchasers of KL Plaza of the proposed renovations works for KL Plaza wherein it was stated that the contractors of the first respondent would be erecting hoardings along the corridors for renovation purposes and as a safety measure for all users of the premises. The redevelopment/renovations of KL Plaza commenced in October 2009. The Kuala Lumpur City Hall had issued a development order dated 4 December 2009.

[24] The building plans in respect of the redevelopment/renovations of KL Plaza were approved by Kuala Lumpur City Hall on 30 April 2010. The aforesaid building plans did not concern the shop houses nor did the same form part of the first respondent's submission to Kuala Lumpur City Hall. It appeared to be the case that in the drawings for the ground floor plan (Level 4), first floor plan (Level 5), second floor plan (Level 6) and third floor plan (Level 7 there were no details, markings and measurements that had been inserted within the areas of the shop houses.

[25] On 29 July 2010, the Fire Services Department issued their fire certification in respect of both the active and passive door protection systems of KL Plaza. The aforesaid fire certification did not include the shop houses as they did not form part of the redevelopment/renovations of KL Plaza. On 13 September 2010, the redevelopment/renovations of KL Plaza were certified complete with the issuance of the certificate of completion & compliance.

[26] the third JMC meeting of the second respondent was held on 26 November 2010 with all remaining elected committee members of the JMC except Ms Khaw Wei See in attendance, and wherein, inter alia, the following material matters were discussed/considered:

(a) the committee members agreed that the house rules are to be adopted after the necessary modifications are made;

(b) on the issue of service charges, and due to the redevelopment of the KL Plaza, there was to be a reduction in expenses, thus, there was a surplus of revenue over expenditure. It was proposed that a rebate be given to the owners of the shopping podium retail outlets, shop houses and carpark, who were the ones primarily affected by the renovations. It was agreed that this proposal would be tabled at the forthcoming general meeting of the second respondent;

(c) the committee members were informed by Mr Vincent Chong (KL Plaza Complex Manager) that various complaints had been received with regards to the redevelopment/renovation works of KL Plaza and that most of the complaints had been attended to save for the complaints from some of the shop house owners that the width of the fire escape corridors for the use of the shopping podium and which the shop houses also have access to, had been narrowed and that they have also suffered loss of rental and loss of business during the period of the redevelopment and renovation of KL Plaza;

(d) the committee members were informed that Kuala Lumpur City Hall had approved the change of building name from KL Plaza to Fahrenheit 88 and it was agreed that the second respondent would write to all owners of KL Plaza of this change after the forthcoming general meeting of the second respondent; and

(e) the audited accounts of the second respondent were also presented to the committee members and which was unanimously adopted to be presented at the forthcoming general meeting of the second respondent. In this regard, the issue of service charges was again discussed by the committee members wherein it was agreed that since the surplus available for the rebate was equivalent to three months of service charges, the same amount would be given to the owners of the shopping podium retail outlets, shop houses and carpark.

[27] On 17 December 2010, the second respondent held a general meeting wherein the audited accounts of the second respondent was adopted, and a resolution was passed for a rebate of the service charges in respect of the shop houses, carpark lot and the shopping podium for period October 2009–December 2009. Various other issues arising relating to the KL Plaza development were also discussed.

AT THE HIGH COURT

[28] Essentially, the crux of the appellants' claims against the respondents concerned the shop houses and the fire escape corridors at the rear sides of both the shop houses and the shopping podium. The appellant's primary pleaded claim against the first respondent was that the first respondent had no right to renovate/redevelop KL Plaza without the consent and approval of the second respondent.

[29] The secondary claim by the appellants was that the first respondent is liable for causing encroachment onto the passageways (fire escape corridors) of Blocks B, C and D by unauthorised construction which narrowed the passageways (fire escape corridors) and unauthorised erection of doors all over the passageways (fire escape corridors) which affect the visibility, ambiance, free access and ingress through the passageways (fire escape corridors), loss of business and related security problems to the users by obstructing the access to and from the open shopping podium area.

[30] The appellants' further secondary claim was that the redevelopment/renovations of KL Plaza as undertaken by the first respondent, had caused nuisance and therefore, the first respondent is liable for noise pollution, excessive dust that settled on the appellants' premises, loss of business and the obstruction to the free movement of the appellants, their agents, servants, tenants and invitees.

[31] The claim against the second respondent was that they had breached their statutory duty by failing to call a general meeting of all the parcel owners to ascertain their wishes and to seek their consent for the renovation works to be carried out by the first respondent. As regards the third respondent, the claim was that they were in breach of their statutory duty to the appellants by failing to verify that the parcel owners had consented and had given their approval for the renovation/redevelopment works before issuing the development order.

[32] There was also a counterclaim by the first respondent against all the appellants to restore the external walls and facades of their respective shop

houses to their original condition, a claim for indemnity against the fifth appellant arising out of an order for the removal of a caveat entered by the 12th appellant.

[33] After a long trial involving a total of 27 witnesses, the learned trial judge dismissed the claim of the appellants and allowed the counterclaim. In a long and careful judgment, the learned judge first found that in the Lian Seng Properties SPA, the sale was for the entire KL Plaza save for the units which had been sold to the appellants and third party purchasers. This was how the learned judge put it (supplementary appeal record ('SAR'), Vol 5 at pp 72–73):

> 122. Looking at the Lian Seng Properties SPA as a whole, it is my finding that the words in the Lian Seng Properties SPA are couched in plain and unambiguous language and the bargain between the parties is clear. The language in the Lian Seng Properties SPA must therefore be given the literal meaning so as to give effect to their intended bargain which is this. Both Lian Seng Properties and Noble Circle had unequivocally expressed in the Lian Seng SPA that what was sold for RM$107,000,000.00 was as stipulated in Recital 9 which comprised of the Said Lands, the shopping podium, the restaurant block, the office towers block and the car parks. This constituted the entire KL Plaza including the Original Lands save for the units which have been sold to the plaintiffs and the third party purchasers and their respective rights in KL Plaza. There is no other meaning intended.
>
> 123. There was no evidence to support the plaintiffs' assertion that Noble Circle was a bare trustee. This Court cannot imply a meaning not intended to by the parties or rewrite the SPA. The parties have transacted the transfer by virtue of Clause 6 which eventually see Noble Circle taken step to amalgamate the Original Lands and became the registered owner thereof. It is obvious they had taken steps to make the SPA effective and operative. The remaining obligations vested upon Noble Circle upon the Completion of the Lian Seng Properties SPA was the provisions in Clause 12.1 and the Fourth Schedule which include amongst others —
>
> (a) to manage the commercial blocks i.e. the shopping podium, the shop houses, the restaurant block, the office tower block and the car park lot;
>
> (b) to be bound by Lian Seng Properties covenants with the other owners of individual units of KL Plaza (the third party purchasers) under the respective sale and purchase agreements;
>
> (c) to procure the issuance of the strata titles for the third party purchasers over their units in KL Plaza;
>
> (d) to execute and deliver a valid and registrable memorandum of transfer in favour of the third party purchasers' units in KL Plaza.
>
> This court must preserve the sanctity of the contract freely entered into by Lian Seng Properties and Noble Circle (see *Maxisegar Sdn Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 1).

[34] For similar reasons, the learned judge held that in the Noble Circle SPA, what was bought was the entire shopping podium save for the units sold. The

learned judge did not agree with the contention that Noble Circle had attempted to convey an interest which it did not have. The learned judge also did not accept that the first respondent was a bare trustee of the registered title. In this context, the learned judge said (at SAR, Vol 5 at p 81):

> 131. Reading the Noble Circle SPA as a whole, just like the Lian Seng Properties SPA, the bargain and intent of the parties are clear and they had executed their bargains accordingly. As submitted by learned counsels for D1, what was bought by D1 was not just certain units in the shopping podium but the entire shopping podium save for the units which had already been sold, The plaintiffs' contention that what Noble Circle bought from Lian Seng Properties was much lesser than what it purported to sell to D1 and hence, Noble Circle had no legal capacity to convey any interest greater than that the interest vested in Noble Circle to D1, must fail. Pursuant to the terms in the Noble Circle SPA, the Said Lands were transferred to D1. D1 is the registered owner of the Said Lands and holds an indefeasible title. As against this backdrop, the plaintiffs cannot substantiate their assertions that D1 was a bare trustee of the registered title.

[35] On the issue of the renovation/redevelopment works carried out by the first respondent, the learned judge held that the appellants were estopped from claiming any compensation for the redevelopment or renovation works pursuant to cll 8 and 14 of the original SPA. In this respect, the learned judge observed (at SAR, Vol 5 at pp 85–86);

> 139. As alluded to earlier, D1 as the developer of KL Plaza had intended to extensively renovate, refurbish and rebrand KL Plaza when the Noble Circle SPA was completed on 13.2.2008 and as KL Plaza building itself was more than 26 years old and outdated. The renovation/redevelopment works did not include the shop houses. Most of the renovations/redevelopment that were carried out were in respect of the shopping podium.
>
> 140. It requires reiteration that by Clauses 8 and 14 of the Original SPA, the plaintiffs had notice and had acknowledged that the parcels they purchased formed part of the overall development of KL Plaza and by reason thereof the condition, state, nature and character of the parcel and the overall development of KL Plaza may be altered from time to time during the continuance of the said development. The plaintiffs have agreed not to make any objection and not to claim any compensation for the disruption to their parcels during the course of the renovation/redevelopment works. Thus the plaintiffs are estopped from going back on what they had agreed on (*Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, *Chor Phaik Har v Choong Lye Hock Estates Sdn Bhd* [1996] 2 MLJ 206, *Raju Jayaraman Kerpaya v Chung Khiaw Bank Ltd* [1997] 2 MLJ 590). The effect of both Clauses 8 and 14 of the Original SPA effectively defeat the plaintiffs' claim as against D1.

[36] On the claim against the second respondent, the learned judge observed that the second respondent was vested with duties and powers under ss 8 and 11 of the BCPA 2007. The learned judge held that the second respondent had the power to approve the redevelopment of KL Plaza.

[37] In any event, there was no breach of duty as the purchasers, through the second respondent, had agreed that the JMC may approve the redevelopment of KL Plaza. The learned judge held (at SAR, Vol 5 at pp 89–90):

> 154. There is ample contemporaneous documentary evidence to show that the unit owners in KLP through members of the JMC who represented them, were appraised of the purpose and plans of the renovation/redevelopment. Having scrutinized and agreed that the renovation/redevelopment would be for the benefit of KL Plaza as a whole, the JMG members including PW11 had unanimously supported and endorsed the renovation/redevelopment plans and had informed the second JMC meeting that the shop houses owners do not have any objections to the renovation/redevelopment.

[38] The learned judge also found the claim against the third respondent, like the second respondent, to be obviously unsustainable. There was no complaint to the third respondent's approval in issuing the development order ('DO'). The DO was issued as the first respondent had complied with all the statutory requirements. It was held that there was no breach of statutory duty on the part of the third respondent.

[39] In the upshot, the appellants' claims were dismissed and part of the counterclaim was allowed. The appellants were ordered to pay substantial costs to the three respondents.

THE INSTANT APPEAL

[40] Much of the same arguments raised in the High Court were set out in the memorandum of appeal and argued before us. However, we note that the pivotal issue before us has to do with the right of the appellants to bring this action and, in particular, whether they are entitled as purchasers to enforce rights relating to the common property. If the appellants are not so entitled, any action which they had filed is a non-starter.

[41] Appreciating this crucial issue, learned counsel for the appellants quite appropriately focused his arguments on the rights of purchasers to the common property. This issue, we agree, is of fundamental importance as the appellants had launched the instant civil suit against the three parties alleging nuisance, trespass and breach of statutory duty, all in respect of common property in KL Plaza.

[42] It was argued that the common property was vested in all the owners of the units. Reference was made to the Singapore case of *Poh Kiong Kok v Management Corporation Strata Title Plan No 581* [1990] 3 MLJ 206 (approved by the Singapore Court of Appeal in *Abraham Aaron Isaac v Management Corporation Strata Title Plan No 664* [1999] 3 SLR 81) which, it

A was submitted, was authority for the proposition that the owners of the units have co-ownership of all the common property. So, the common property belongs to all and the appellants had the standing to sue. It was argued that in the instant case, the first respondent developer had gained an additional floor space of 48,000 feet at the expense of the purchasers of several units. The
B contention was that approval for any redevelopment or renovation ought to have been obtained at a general meeting of all the owners of the units and not approval by the second respondent only.

C **[43]** Given these arguments, which do seem quite persuasive at first blush, it is necessary to appreciate the overall scheme and the legal structure set up for the management of strata title buildings. The governing law in relation to strata title management at the relevant time was the Building and Common Property (Maintenance and Management) Act 2007 ('the BCPA 2007') which came
D into force on 12 April 2007 (now replaced by the Strata Management Act 2013).

[44] Section 4 of the BCPA 2007 requires the establishment of a Joint Management Body ('JMB') consisting of the developer and the purchasers of
E any building intended for subdivision into parcels. The JMB may sue or be sued in its name (s 4(3) of the BCPA 2007). As required by s 5 of the BCPA 2007, the first respondent, as the developer of KL Plaza, convened the first meeting of the KL Plaza JMB on 29 May 2008.

F **[45]** The composition of the KL Plaza JMB automatically and compulsorily includes all of the parcel owners/purchasers of the KL Plaza. At the First AGM of the second respondent, the representatives of the parcel owners/purchasers were duly nominated and elected to form and constitute the JMC of the KL Plaza JMB. This is as required by ss 6(1) and 11(1) of the BCPA 2007. The
G JMC members are the duly elected office bearers and committee members and the JMC is vested with the powers and duties of the JMB according to s 11(1) of BCPA 2007 which states:

> 11(1) The Body shall elect a Joint Management Committee who, subject to any restriction imposed or direction given by the Body at a general meeting, may
H perform the Body's duties and conduct the Body's business on its behalf, and may for that purpose exercise any of the Body's powers.

[46] This must mean that the JMC is empowered by the aforementioned
I s 11(1) to undertake the role of the JMB save and except for matters which have been restricted by the JMB at a general meeting. These duties and powers of the JMB and the JMC are set out in s 8 of the BCPA 2007 which provides:

> 8 Duties and powers of Joint Management Body
>
> (1) The duties of the Body include the following:

(a) to properly maintain the common property and keep it in a state of good and serviceable repair;

(b) to determine and impose charges that are necessary for the repair and proper maintenance of the common property;

(c) to insure and keep insured the building to the replacement value of the building against fire and such other risks as may be determined by the Body;

(d) to apply insurance moneys received by the Body in respect of damage to the building for the rebuilding and reinstatement of that building;

(e) to comply with any notices or orders given or made by the local authority or any competent public authority requiring the abatement of any nuisance on the common property, or ordering repairs or other work to be done in respect of the common property or other improvements to the property;

(f) to prepare and maintain a register of all purchasers of the building;

(g) to ensure that the Building Maintenance Fund is audited and to provide audited financial statements for the information to the purchasers;

(h) to enforce house rules for the proper maintenance and management of the building; and

(i) to do such other things as may be expedient or necessary for the proper maintenance and management of the building.

The powers of the Body shall include the following:

(a) to collect from purchasers maintenance and management charges in proportion to the allocated share units of their respective parcels;

(b) to authorize expenditure for the carrying out of the maintenance and management of the common property;

(c) to recover from any purchaser any sum expended by the Body in respect of that parcel in complying with any such notices or orders as are referred to under paragraph (1)(e);

(d) to purchase, hire or otherwise acquire movable or immovable property for use by the purchasers in connection with their enjoyment of the common property;

(e) to arrange and secure the services of any person or agent to undertake the maintenance and management of the common property of the building;

(f) to make house rules for the proper maintenance and management of the building; and

(g) to do all things reasonably necessary for the performance of its

duties under this Act

The Body shall be deemed —

(a) for the purposes of effecting any insurance under paragraph (1)(c), to have an insurable interest in the building equal to its replacement value or any value as determined by the Body; and

(b) for the purposes of effecting any insurance under paragraph (1)(d), to have an insurable interest in the subject matter of the insurance.

Where the Body incurs any expenditure or performs any repair, work or act that it is required or authorized by or under this Part to do or consequent upon the service on the Body of any notice or order by any local authority or under any other written law, and the expenditure or the repairs, work or act were or was rendered necessary by reason of any wilful or negligent act or omission on the part of, or breach of any provision of its by-laws by, any purchaser or his tenant, lessee, licensee or invitee, the amount of that expenditure expended by the Body in performing the repairs, work or act shall be recoverable by the Body from that purchaser.

The generality of this section shall not be prejudiced by any other provision in this Part conferring a power or imposing a duty on the Body,'

[47] It is worth noting that under the BCPA 2007, an extraordinary general meeting is required to be convened in three instances as set out under s 10(1)(a), (1)(b) or (1)(c) of the same Act. The first instance is when a requisition in writing is made by the purchasers who together form at least one-quarter of the total number of parcels registered. The second is when there is a direction to hold such an EGM by the Commissioner of Buildings. And the third is on such occasion as the JMB thinks fit.

[48] So, coming back to the first criticism that the approval for the renovation/redevelopment ought to have been obtained at a general meeting, and in the context of the evidence in the instant case, it is plain that the JMC's powers and duties have not been restricted in any way in the general meeting. This is borne out from the minutes of meetings of both AGMs held by the JMB on 29 May 2008 and on 17 December 2010. There were also none of the requisitioning situations under s 10(1)(a), (1)(b) or (1)(c) of the BCPA 2007.

[49] It would therefore appear that the approval given by the JMC, on behalf of the JMB, without calling for the general meeting, was perfectly valid and within the powers and duties under the BCPA 2007. In short, there was no breach of the Act and it must follow that there was no breach of any statutory duty as claimed.

[50] In any case, the parcel owners/purchasers were well aware of the proposal for the renovation/redevelopment of KL Plaza during the first JMB

meeting held on 29 May 2008. The minutes show that questions were asked about the said proposal and no one raised any objections. The renovation/redevelopment of KL Plaza was then discussed during the first JMC meeting held on 1 August 2008 whereby all seven JMC members elected were present including Mr Leong Yuen @ Leong Nam Yuen, in his capacity as the committee member representing the shop house owners. He had given evidence at the trial as PW11.

[51] As mentioned earlier in the judgment, the perspectives of the proposed renovation/redevelopment were also presented to the JMC members. None of the members had raised any objection. The second JMC meeting was held on 26 November 2008 where the JMC unanimously confirmed the minutes of the first JMC meeting. None of the JMC members had raised any objection.

[52] At the second JMC meeting held on 26 November 2008, the JMC members discussed the access via the mall after business hours where the JMC took the view that the shop houses entrances were from the outside of the mall and therefore no access will be extended from the inside of the mall after business hours. No JMC members, including PW11, had challenged this. The JMC members were shown the redevelopment plans on the external and internal changes to be made to KL Plaza and discussed the issue of the fit-out works at KL Plaza where all the JMC members did not object and unanimously agreed that the timing be left with the developer, the first respondent. All JMC members had unanimously supported and endorsed the renovation/development of KL Plaza to be undertaken by the first respondent. All parcel owners/purchasers were then duly given adequate notice of the renovation/redevelopment works vide notice dated 20 October 2009 and upon which the renovation/redevelopment works commenced. The renovation/redevelopment of KL Plaza was certified completed on 13 September 2010.

[53] The Third JMC meeting was held on 26 November 2010 where the JMC unanimously confirmed the minutes of the second JMC meeting. None of the JMC members had raised any objection regarding the renovation/redevelopment of KL Plaza. The second JMB AGM Meeting of the KL Plaza was held on 17 December 2010 where none of the parcel owners/purchasers had raised any objections regarding the renovation/redevelopment of the KL Plaza. There was also no documentary evidence or even oral evidence from the appellants during trial to show that there were any objections raised by any of the parcel owners/purchasers (including the appellants) during the second JMB AGM Meeting of the KL Plaza held on 17 December 2010 regarding the renovations of KL Plaza.

[54] It is very pertinent to note that the Second JMB AGM Meeting of the KL Plaza, which was held on 17 December 2010, was after the renovation/redevelopment of KL Plaza had been completed on 13 September 2010, where all parcel owners/purchasers had the opportunity to voice out any complaints about the renovation/redevelopment of KL Plaza. But no one complained about the renovation/redevelopment at all. There was also no evidence at the trial from any of the appellants that any of them had raised any objections regarding the renovation/redevelopment during this second JMB AGM.

[55] Be that as it may, and as set out in the background facts at the outset, during the First JMB Meeting convened on 29 May 2009, all the parcel owners/ purchasers who were present were informed of the nomination and election process and it was unanimously agreed that the JMC would be represented by a mix of retail, apartment and shop house owners/purchasers to ensure fair representation at the JMC. No objection was raised. Amongst the parcel owners/purchasers' representatives elected to the JMC was PW11 who represented the shop house owners. PW11, in the JMC meetings, had not only not objected but had supported and endorsed the renovation/redevelopment of KL Plaza to be undertaken by the first respondent on behalf of the owners of the shop houses.

[56] The learned judge agreed and found that there was ample contemporaneous documentary evidence to show that the parcel owners/purchasers, through members of the JMC who represented them, including PW11 who represented the appellants/shop houses, were apprised of the purpose and plans of the renovation/redevelopment of KL Plaza and had unanimously supported and endorsed the renovation/redevelopment. We think the learned judge was certainly entitled to come to such a finding.

[57] Even so, there is another serious infirmity in the appellant's standing to commence the suit against the respondents which we are compelled to address. We agree with the respondents that the appellants do not have any right in law or equity to pursue their claims in respect of common property. By virtue of statutory law in the form of s 8 of the BCPA 2007, the second respondent has sole control and management of the common property of KL Plaza. By law, the JMB is the guardian of the common property. Any claims against third parties in relation to the common property can only be brought by the JMB and not the individual parcel owners or some of them together as is the case in the instant suit. It is for the JMB alone to pursue such claims for the benefit of all parcel owners. It is for this reason that the JMB has been given the right in law to sue or be sued in its name.

[58] In coming to this view, we have not overlooked the Singapore case of Poh Kiong Kok. That case can be distinguished as it was an action brought by a proprietor against the management corporation of the condominium known as Pandan Valley. We have no quarrel with the finding that all co-proprietors had a unity of possession and that no proprietor could claim possession of a separate part of the property against his co-proprietor. In that case, the plaintiff was prevented from using the common property which was his preferred carpark. He was certainly entitled to assert that all proprietors had equal rights to the use and enjoyment of the common property.

[59] However, it does not follow that each proprietor, although having equal rights to the common property, can bring actions against third parties in relation to the common property. Such rights have been circumscribed by law. In *Poh Kiong Kok's* case, the action was not against any third party but against the management corporation for breach of his right to enjoy the common property. As such, and with respect, that authority offers no assistance to the appellants here.

[60] Following from our conclusions as aforesaid, the appellants had effectively no standing to sue the respondents. In our view, what we have found thus far would be sufficient to dispose of this appeal and we do not think we need to consider some of the other matters raised as the question of whether the appellants' claims is actionable forms the crux of this appeal.

CONCLUSION

[61] In the circumstances, and for the reasons stated, we are not persuaded that the High Court was plainly wrong such that appellate intervention is warranted. Accordingly, the appeal is dismissed with costs and the order of the High Court is affirmed.

Appeal dismissed with costs; order of High Court affirmed.

Reported by Dzulqarnain Ab Fatar